114

(3)

No. 08-502

Supreme Court, U.S.
FILED
DEC 1 1 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

D.G., Guardian Ad Litem for J.G., a Minor,

Petitioner,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, Director of Pupil Services, JANE DELANEY, Supervisor, Special Education, and MARILYN BIRNBAUM, Superintendent,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

REPLY BRIEF

FRANCINE A. GARGANO
20 Shawnee Drive, Suite B
Watchung, New Jersey 07069
(908) 753-2079

Attorney for Petitioner

219956

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
OBJECTIONS TO PROCEDURAL HISTORY AS PRESENTED BY RESPONDENTS	1
CORRECTIONS TO RESPONDENTS' CLAIM OF FACTS SUBSTANTIATED AT TRIAL	2
I. REVIEW SHOULD NOT BE DENIED BECAUSE THE PETITION WAS FILED ON TIME	6
II. THE PETITION SHOULD NOT BE DENIED BECAUSE THERE ARE NO NECESSARY PARTIES TO BE JOINED	7
III. REVIEW SHOULD NOT BE DENIED BECAUSE PETITIONER CAN FACTUALLY AND LEGALLY SUBSTANTIATE HIS ALLEGATIONS OF UNJUST TREATMENT BY THE COURTS	8
A. JUDGE KUMPF DID ERR BY SEVERING THE CASE	8

Contents

Page

B. PETITIONER WAS FORCED TO SEEK A CHANGE OF VENUE AND THEREFORE IS NOT JUDICIALLY ESTOPPED FROM CLAIMING HE WAS TREATED UNFAIRLY 9

C. THE TRIAL COURT'S DEMEANOR IN THE COURTROOM WAS IMPROPER AND UNFAIR .. 10

IV. THERE WAS PRIMA FACIE EVIDENCE OF VIOLATIONS OF THE ADA AND REVIEW BY THIS COURT IS WARRANTED AND NECESSARY 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

STATUTE

5 U.S.C. § 6103 7

RULES

Sup. Ct. R. 13.1 7

Sup. Ct. R. 13.2 7

Sup. Ct. R. 30.1 7

OBJECTIONS TO PROCEDURAL HISTORY AS PRESENTED BY RESPONDENTS

There are a few items in Respondents' rendition of the procedural history that need correction.

First, when Plaintiff requested an appeal of the decision of Judge Clark from the Office of Administrative Law (hereinafter OAL),[1] it was because the Defendants were trying to have the Plaintiff's school *PSYCHOLOGIST* testify about conversations she had with the Plaintiff in violation of the law and Plaintiff's rights.[2]

Second Defendants play fast and loose with the facts where they say that Plaintiff failed to appear before Judge Clark for the hearing. This is false. It was the Defendants who failed to appear before Judge Hoens in Superior Court even though they were provided notice by the Plaintiff's counsel. Additionally, knowing

---

[1] Respondents try to make it sound like the Plaintiff did something improper by appealing Judge Clark's decision to the Superior Court when in fact it was procedurally correct and his absolute right to do so. The Appellate Division in their decision was incorrect that it should have been appealed to the Appellate Division. As Respondents' state correctly, appeal from a decision of the OAL is to the Superior Court. This was another error made by the New Jersey Appellate Court in deciding Plaintiff's case.

[2] The Defendants decided to change the school psychologist's title to guidance counselor when the appeal was made because guidance counselors are not under the same restrictions as psychologists.

the hearing was taking place in the Superior Court they proceeded to the OAL anyway to get a decision *in abstentia*. Judge Hoens had to put a stay on that proceeding which remained in effect for all those years until Judge Kumpf reversed everything that had been done by the Parties.

Third, the Superior Court case was with Judge Hoens until she was sent to the Appellate Division, then it went to Judge Gasiorowski. By that point, Defendants' insurance carrier was insolvent and new problems developed in the case.

Lastly, and probably the most important, is Defendants' insistence that the cases were only consolidated for settlement purposes. This is totally false and our position is substantiated in transcripts where it was laid out on the record with all counsel present that the consolidation was for trial purposes.

CORRECTIONS TO RESPONDENTS' CLAIM OF FACTS SUBSTANTIATED AT TRIAL

Respondents in their Reply Brief state that the Plaintiff's positions were not substantiated at trial. Twisted facts like Mr. Beckford worked for the Defendants for five years does not make clear that this was after he was taken away from working with the Plaintiff – not before –. The Defendants were to provide training of Mr. Beckford prior to the start of school which they failed to do.

There was testimony from the Plaintiff's aide and also his conductive educator about Mr. Beckford's

inability to properly care for the Plaintiff. Additionally, what the Defendants fail to tell the Court, is that the Plaintiff himself is very smart and articulate.[3] He was more than capable of laying out for the jury the indignities he endured at the hands of the Defendants. He testified to Mr. Beckford sleeping in class, refusing to take him to the bathroom and making him sit in his own urine and feces (which was substantiated by the conductive educator).

Everyone was aware of the chemicals poured all over the Plaintiff by the unqualified Mr. Beckford. Plaintiff's mother reported it immediately to the Principal, Mrs. Plewa, and it was also reported to DYFUS. DYFUS never followed up on the complaint because Mr. Beckford was removed from being Plaintiff's aide. DYFUS never said that Mr. Beckford was exonerated from any wrong doing.

It was the only one of Defendants employees who dared to tell the truth, Connie Fenner, who indicated that she had difficulty with the Defendants when it came to Plaintiff's tutoring and she outlined the hostility she encountered. This confirmed testimony of Plaintiff's mother.

Plaintiff's mother and attorney had to fight way before the due process petition discussed in this appeal was filed for every single thing that Plaintiff received.

---

[3] Plaintiff was born with his intelligence which was nurtured by his family despite Defendants trying to take credit for same. Schools can only educate you; God gives you your intelligence.

Even when the school promised to do things like provide computers and computer equipment, they would delay the purchases causing problems for the Plaintiff.

The letter submitted at trial proved that Plaintiff was unwanted at Somerset School and that the Defendants were refusing to make the necessary accommodations. They can say whatever they want about it but that letter could not have been clearer and it was in harmony with the actions of the Defendants as outlined through the testimony of multiple witnesses.

Plaintiff did not receive adaptive physical education. Books on tape were not provided until after years of fighting and arguing.

Defendants like to argue that the Plaintiff's mother found the Middle School and High School physically acceptable. How can that possibly be true when the complaint filed in Superior Court made it clear that it was not acceptable. Defendants tried to argue at trial that she accepted the building but she did not that was why she was in the lawsuit to begin with. It was also why many attempts were made by the attorneys to resolve these issue through motions, mediation, settlement conferences, etc. So if it was all right with everyone, why were we in Court?

Defendants try to argue that the testimony was that they did not have to have their building ADA compliant because it was a public building. The fact that the lift

was not the right size[4], could not be operated independently by Plaintiff and was constantly broke made no difference according to Defendants. However that was not the testimony of Mr. Gaunt. It was his testimony that the equipment should have been adapted for the Plaintiff.

Despite what Defendants argue here, at trial, the records of their lift company, the testimony of Plaintiff, his aide, conductor, mother and even the janitor, substantiated the fact that there were constant problems with the lifts, which interfered with his schooling. The one lift was actually broken from April 15, 2005 until the end of October in the following school year. A video was presented at trial where his mother taped him in the elements because the lift was broken and he had to go outside the building and reenter through another door. The police were called to prevent her from taking the video tape to be used at trial.

Defendants try to make this Court (and the jury) believe that there was something abnormal about the Plaintiff's wheelchair. They portray it as if it is extremely large when in fact it is of standard weight and size for today's power wheelchairs. The lifts that had been put in previously were done to accommodate a student who came up through the ranks before the Plaintiff who was in a manual wheelchair.

---

[4] There was testimony by Plaintiff and his aide that the lift actually broke, crashing to the ground while he was on it and causing him and the wheelchair to be wedged against the wall. The Plaintiff had to be lifted out by the janitors and then take his wheelchair out separately. This occurred because it was not the correct size for Plaintiff's wheelchair.

You notice that nowhere in Respondent's argument is there anything that contradicts the fact that they used evidence that was supposed to be excluded because of the severance of the cases. That's because they did and the Judge allowed it even though Plaintiff was precluded from doing likewise.

The Defendants try to taint this Court, like they did to the jury, by mixing IEP issues with ADA/LAD issues. They were not supposed to mix the two at trial, and Plaintiff was precluded from doing so, but the Defendants were not. They painted a picture to the jury that they were doing all of these wonderful things for the Plaintiff when in fact it was items they were required by law to do.

I. REVIEW SHOULD NOT BE DENIED BECAUSE THE PETITION WAS FILED ON TIME

Respondents try to play with this Court, waste this Court's time, the Appellant's time and money, by claiming that the Petition in this matter was untimely filed. In fact, that is not true.

The copy of the Order of the Supreme Court of New Jersey denying the Plaintiff's Petition was in fact never signed by Judge Rabner. The actual Order was apparently sent to the Clerk for filing without signature. Stephen Townsend, Clerk of the Supreme Court stamped and signed it as a true copy and also signed it on the signature line. Thus, the only Court action taken in this matter was when the Clerk of The New Jersey Supreme Court filed same and entered it on the docket. The date the Order was filed was on July 15, 2008.

Per Sup. Ct. R. 13.1 the Petition must be filed within 90 days "after entry of the judgment." It does not say 90 days after being signed by a Judge. It refers only to entry which in this case was when it was entered upon the docket. 90 days from July 15, 2008 was October 13, 2008. Respondents are correct about this. However, by Court rule, Columbus Day, which fell on October 13, 2008 this year, is a Court recognized holiday, see 5 U.S.C. § 6103. Thus, the Court is closed. Per Sup. Ct. R. 30.1 when a filing date falls on a weekend or Court holiday, the date for filing is the next week day in which the Court is open. In this case, October 14, 2008.

Therefore, the Petition in this matter was timely filed. Additionally, had the petition not be filed in a timely manner, the Clerk of the Court would have refused to accept same and that is not the case here. Sup. Ct. R.13.2 provides the clerk of the court "will not file any petition for a writ of certiorari that is jurisdictionally out of time." The Petition was docketed by this Court.

Given all of the facts, this Petition was filed on time and should not be denied.

II. THE PETITION SHOULD NOT BE DENIED BECAUSE THERE ARE NO NECESSARY PARTIES TO BE JOINED

Defendants make wild allegations about necessary parties not being joined but point to no decisions that state that the Superior Court or the State of New Jersey must be joined in this particular case. In fact, Defendants have been fighting these exact same issues both at trial level and beyond and have never once raised this issue.

When an appeal is taken initially, notice is provided to the Judge who sat below. That gives them the opportunity, if they feel it necessary, to bring in the State or Superior Court to represent them.

Lastly, there is nothing precluding the Defendants from joining these Parties if they believe they should be joined.

III. REVIEW SHOULD NOT BE DENIED BECAUSE PETITIONER CAN FACTUALLY AND LEGALLY SUBSTANTIATE HIS ALLEGATIONS OF UNJUST TREATMENT BY THE COURTS

A. JUDGE KUMPF DID ERR BY SEVERING THE CASE

The Defendants want to insist that Plaintiff was somehow at fault by not "exhausting their administrative remedies". In fact, the Plaintiff was injured by the cases being consolidated because the IDEA portion of the case was not resolved quickly and Plaintiff had to continue to endure the same problems year after year waiting for a trial in this matter.

The Defendants wanted the matters consolidated and it was only after their insurance carrier went into liquidation and a new attorney came in did the idea come about that the consolidation was wrong.

A terrible precedence has been established here whereby attorneys can delay cases through consolidation and then on the eve of trial have them again severed.

Additionally, there is nothing in the law that precludes the Superior Court from assuming jurisdiction, especially in cases like here where there were matters involving the ADA and NJLAD, as well as IDEA, and they overlapped.

Allowing this case to stand the way it has been decided will limit the jurisdiction of the State Courts and that was not intended by the act. If the legislature wants it to be that way, then the IDEA should be re-written to specifically state under no circumstances can a State Court hear these cases except upon appeal.

B. PETITIONER WAS FORCED TO SEEK A CHANGE OF VENUE AND THEREFORE IS NOT JUDICIALLY ESTOPPED FROM CLAIMING HE WAS TREATED UNFAIRLY

This reminds me of the witch trials where the woman would be submerged in water. If she somehow survived then that was proof she was a witch. She was then burned at the stake. If she died that was proof she wasn't a witch but she ultimately ended up dead anyway.

If Plaintiff had just accepted the fact that he could not testify from the jury box like everyone else, and instead testified from the floor, he sent the message to the jury that, 1) he was not worthy of the same treatment as people without disabilities, and 2) it was perfectly acceptable for people to treat him differently. Either way, that would have also meant that the treatment from the Defendants was acceptable.

Like the alleged witch, he chose to fight and asked to be transferred out of county – because he had no choice. Again, he was running the risk of the jurors seeing that he was being treated differently than everyone else due to the transfer but at least it wasn't in their face with him testifying from the floor while everyone else testified from the witness box which is elevated. Here everyone testified from the box on the floor.

What is really interesting is that Defendants cite Judicial Estoppel. Judicial Estoppel is precisely what precluded them from asking Judge Kumpf to dismiss Plaintiff's IDEA actions because of failure to exhaust administrative remedies and what precludes them from arguing here that his decision to sever the cases was correct. They cannot have it both ways.

C. THE TRIAL COURT'S DEMEANOR IN THE COURTROOM WAS IMPROPER AND UNFAIR

Plaintiff has pointed, and can continue to point, throughout the trial transcripts to where the Judge below discriminated against the Plaintiff and deliberately interfered with his presentation of the case.

We start with the way the Judge treated Plaintiff's wheelchair as if it was a nuisance. Plaintiff could not move around in his wheelchair without comments and nasty looks from both the Judge and Defendants' counsel. Defendants' counsel admitted to this on the record in oral argument before the New Jersey Appellate Division.

Then there were the comments from both the Judge and Defendants' counsel about Plaintiff's actions because he has difficulty controlling his emotions. This is part of his cerebral palsy and on the record counsel offered to get something from Plaintiff's doctors to substantiate this.

Counsel did object to the Judge's comments toward the Plaintiff and even requested that the Judge stop making comments to the jury about Plaintiff's need to leave the room (which was primarily due to the fact that he was accused of being disruptive by moving in his chair to get comfortable) and his movements.

IV. THERE WAS PRIMA FACIE EVIDENCE OF VIOLATIONS OF THE ADA AND REVIEW BY THIS COURT IS WARRANTED AND NECESSARY

How does one participate in school when they are told they are not allowed to go to that school? How do you claim that your services, programs and activities are readily accessible when you are told you can stay home and be tutored or be forced into a school other than where your peers are and they will give you a self contained classroom?

The letter from the Defendants to Plaintiff precluded him from going to school because the building was not ADA compliant. According to the ruling in this case, all educational institutions, and other public buildings as well, can preclude the disabled from their buildings by just saying it is not ADA complaint. How then are we going to make education inclusive for the disabled? We are not.

Defendants are arguing that they were under no duty to make accommodations for the Plaintiff to go to school, specifically, Somerset School, because the only time that would be their responsibility would be when there were renovations.[5]

The letter was prima facie evidence (even the Judge stated this during the trial) that Plaintiff's rights were violated. Yet, the jury came back with a verdict in favor of the Defendants. It then became the Judge's job to overturn that verdict.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

FRANCINE A. GARGANO
20 Shawnee Drive, Suite B
Watchung, New Jersey 07069
(908) 753-2079

Attorney for Petitioner

---

[5] Of course, the Middle School and High School had such major renovations done to them and yet the bathrooms and lifts were not made ADA compliant and were not able to accommodate Plaintiff.